QI QIAOXIAN (CLAIMING AS THE MOTHER AND DEPENDENT OF QI XIANGQING, DECEASED) & ANOR v. SUNWAY PUTRA HOTEL SDN BHD

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
AZIMAH OMAR JCA
WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: W-04(NCVC)(W)-330-07-2022]
2 APRIL 2024

Abstract – *Rule 8(1) of the Rules of the Court of Appeal 1994 provides that a respondent can only file a notice of cross-appeal to the Court of Appeal against the decision of the High Court if the respondent intends to vary the High Court's decision. When the High Court's decision is wholly in favour of the respondent, as in this case, the respondent has no basis to file the cross-appeal as there is nothing in the High Court's decision to be varied in the respondent's favour.*

CIVIL PROCEDURE: *Appeal – Cross-appeal – Deceased checked into hotel and swam in pool and drowned – Parents and dependents of deceased claimed for damages for negligence – Claims dismissed by Sessions Court and High Court – Claimants appealed against decision to Court of Appeal – Hotel cross-appealed – Whether hotel could file cross-appeal – Rules of the Court of Appeal 1994, r. 8(1)*

TORT: *Negligence – Duty of care – Deceased checked into hotel and swam in pool and drowned – Parents and dependents of deceased claimed for damages for negligence – Whether hotel liable to claimants for tort of negligence – Whether hotel owed duty of care – Whether hotel breached duty of care – Whether breach of duty of care caused deceased's death – Whether hotel could rely on warning notice – Whether defence of volenti non fit injuria applied*

TORT: *Occupier's liability – Ingredients – Deceased checked into hotel and swam in pool and drowned – Parents and dependents of deceased claimed for damages for negligence – Whether hotel liable to claimants for tort of negligence – Whether hotel had sufficient degree of control of pool at time of incident – Whether hotel liable to deceased as 'occupier' of pool – Whether deceased guest of hotel – Whether drowning of deceased constituted 'unusual danger' to deceased for which hotel failed to take reasonable care as occupier of pool to prevent drowning – Whether ingredients of occupier's liability satisfied*

TORT: *Damages – Claim for – Claim premised on torts of negligence and occupier's liability – Deceased checked into hotel and swam in pool and drowned – Claim by parents and dependents of deceased – Whether torts of negligence and occupier's liability proven – Whether claim for special damages could only be proven by documentary evidence*

This appeal arose from a tragedy that had befallen one Mr Qi Xiangqing ('deceased'), a 22-year-old male citizen of the People's Republic of China ('PRC'). The deceased was a tourist in Malaysia and had checked into the hotel owned by the respondent ('defendant'). It was after checking into the hotel that the deceased swam in the pool where he drowned and died. The appellants ('plaintiffs') were the parents and dependents of the deceased. The plaintiffs filed an action in the Sessions Court against the defendant and claimed for damages for the deceased's death based on two causes of action: (i) tort of negligence; and (ii) tort of occupier's liability ('action'). The Sessions Court dismissed the action and as such, the plaintiffs appealed to the High Court against the Session's Court decision. The High Court dismissed the plaintiffs' appeal. According to the Sessions Court and the High Court, (i) the plaintiffs failed to prove the conditions for instituting a dependency action under s. 7(2) and (8) of the Civil Law Act 1956 ('CLA'); and (ii) due to the non-compliance with s. 78(1)(f) of the Evidence Act 1950 ('EA'), both the Sessions Court and the High Court refused to admit as evidence the following documents tendered by the plaintiffs: (a) the original documents from PRC (in the Chinese language) evidencing the fact that the plaintiffs were the deceased's parents; and (b) the English translation of the heir certificate ('PRC documents'); (iii) in view of the inadmissibility of the PRC documents, the plaintiffs failed to prove that they were the deceased's parents and consequently, the plaintiffs had no *locus standi* to commence the action. Hence, this appeal by the plaintiffs and cross-appeal by the defendant. The defendant's cross-appeal was against the following sums of damages calculated by the High Court: (i) travelling expenses; (ii) funeral expenses; (iii) loss of support; and (iv) interest award. The issues that arose were, *inter alia*, (i) whether the defendant could file the cross-appeal; (ii) whether the defendant could dispute the plaintiffs' right to file the action; (iii) whether the defendant was estopped from denying that the plaintiffs were the deceased's parents; (iv) whether the PRC documents were admissible as evidence; (v) whether the defendant was liable to the plaintiffs for tort of occupier's liability; (vi) whether the defendant was liable to the plaintiffs for tort of negligence; (vii) whether the defendant's duty of care existed; (viii) whether there was breach of the defendant's duty of care and whether the breach had caused the deceased's death; (ix) whether the defendant could rely on warning notice; (x) whether the defence of *volenti non fit injuria* applied; and (xi) whether the claim for special damages could only be proven by documentary evidence.

Held (striking out cross-appeal)
Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) According to r. 8(1) of the Rules of the Court of Appeal 1994 ('RCA'), a respondent could only file a notice of cross-appeal to the Court of Appeal against the decision of the High Court if the respondent intends to vary the High Court's decision. The defendant's cross-appeal was

incompetent for the following reasons: (i) the High Court's decision was wholly in favour of the defendant. Consequently, the defendant had no basis to file the cross-appeal under r. 8(1) of the RCA because there was nothing in the High Court' decision to be varied in the defendant's favour; (ii) if the cross-appeal was not struck out, it would send a wrong message that notwithstanding the fact that the respondent had wholly succeeded in the High Court, the respondent could still file notices of cross-appeal to the Court of Appeal against such decisions of the High Court; and (iii) if the cross-appeal was struck out, no prejudice was occasioned to the defendant because the defendant could still oppose the appeal to the hilt. (para 17)

(2) Firstly, the defence did not plead that the plaintiffs had no right to institute the action. Secondly, in accordance with O. 34 r. 2(2)(k) of the ROC, all the parties had agreed to the three issues to be tried. The Sessions Court and High Court Judges had committed an error of law in failing to consider that the defendant was bound by the defence and the three issues to be tried. The defendant should not be allowed to raise any new issue which had: (i) not been pleaded in its defence; and (ii) been previously agreed to by all the parties in this case pursuant to O. 34 r. 2(2)(k) of the ROC. (para 20)

(3) The Sessions Court and High Court Judges had committed a plain error of fact when both courts failed to decide that the defendant was estopped by the undisputed facts (in para. [21]) from denying that the plaintiffs were the deceased's parents. (paras 21 & 22)

(4) The plaintiffs had successfully proven the admissibility of the original PRC documents, as evidenced in this case pursuant to s. 74(iii) of the EA and the first limb of s. 78(1)(f) of the EA. Consequently, the error of the Sessions Court Judge in marking the original PRC documents as 'IDs' could not bar the admissibility of the PRC documents. (para 36)

(5) For the defendant to be liable to the plaintiffs pursuant to the tort of occupier's liability, the plaintiffs had to prove cumulatively the following three elements of such tort: (i) the defendant had sufficient degree of control of the pool at the time of the incident so as to be liable to the plaintiff as an 'occupier' of the pool ('first element'); (ii) the deceased was a guest of the defendant in the hotel ('second element'); (iii) the drowning of the deceased constituted an 'unusual danger' to the deceased for which the defendant had failed to take reasonable care as an occupier of the pool to prevent the drowning ('third element'). The first and second elements had been satisfied. However, the third element could not be established by the plaintiffs because swimming in the pool did not constitute an 'unusual danger' to the hotel's guests, including the deceased. (paras 37 & 38)

(6) The defendant's duty of care existed as supported by the following evidence and reasons: (i) there was sufficient legal proximity between the deceased and the defendant; and (ii) the existence of the defendant's duty of care was not negated by any policy consideration. Notwithstanding the reasons given by the Sessions Court and High Court Judges, there was an 'unwarranted deduction based on faulty judicial reasoning from admitted and established facts'. This was due to the following evidence and reasons: (i) the deepest part of the pool was three metres; (ii) the defendant operated a five-star hotel and the deceased had paid for the defendant's services in a five-star hotel and; and (iii) in view of the three-metre deep pool, any reasonable operator of a five-star hotel should have ensured that (a) a certified lifeguard should be on duty at the pool when the pool was open to the hotel's guests, including the deceased; and (b) at the time of the incident, an employee of the defendant should be monitoring the CCTV which had already been installed at the pool. Otherwise, why would the defendant install the CCTV in the first place. The failure of the Sessions Court and High Court Judges to decide that the plaintiffs had proven on a balance of probabilities the breach of the defendant's duty of care was a plain error of fact. It was clear that the breach of the defendant's duty of care had caused the death of the deceased. (paras 40, 43, 45 & 46)

(7) The Sessions Court and High Court Judges committed a mixed error of law and facts in deciding that the defendant could not be liable to the plaintiffs for the incident due to the warning notice. Before the defendant accepted the deceased as a guest of the hotel, the defendant did not require the deceased to agree to any 'disclaimer of liability' for any inquiry or death which might befall the deceased when he was staying at the hotel. Further, the contract between the deceased and the defendant did not contain any clause which would exclude the defendant's liability for the incident. There was also no evidence that the deceased understood English, namely the contents of the warning signboard. (para 51)

(8) Both the Sessions Court and High Court Judges had made a far-reaching decision, namely that the defence of *volenti non fit injuria* could absolve wholly the liability of the defendant in negligence claims. The deceased voluntarily took the risk of swimming in the pool. The deceased, however, did not voluntarily agree to assume the risk of any harm to the deceased which might be caused by the defendant's negligence. Accordingly, the Sessions Court and the High Court Judges had erred in law when they applied the defence of *volenti non fit injuria* in this case. (paras 52 & 58)

(9) The Sessions Court and High Court Judges had committed an error of law when they rejected the plaintiffs' claim for special damages solely on the grounds that the plaintiffs had adduced no document in support of such a claim. In this case, no evidence had been adduced by the defendant to show that the plaintiffs were not truthful witnesses and their oral evidence on their claim for special damages was not credible. (para 61)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Jamaal Abu Bakar Bawazir lwn. Ismail Husin & Yang Lain [2020] CLJU 632; [2020] 1 LNS 632 HC ***(refd)***

Kaliamah Rajan & Yang Lain lwn. Superintendent Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain [2020] 9 CLJ 252 CA ***(refd)***

Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Nguyen Doan Nhan v. PP And Another Appeal [2018] CLJU 1583; [2018] 1 LNS 1583 CA ***(refd)***

Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***

Pembinaan SPK Sdn Bhd v. Conaire Engineering Sdn Bhd-LLC & Anor And Another Appeal [2023] 3 CLJ 677 FC ***(refd)***

PP v. Datuk Hj Harun Hj Idris & Ors [1977] CLJU 92; [1977] 1 LNS 92 HC ***(refd)***

Rexallent Construction Sdn Bhd v. MSIG Insurance (Malaysia) Bhd & Other Cases [2022] CLJU 1736; [2022] 1 LNS 1736 HC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Slater v. Clay Cross Co Ltd [1956] 2 QB 264 ***(refd)***

STU v. The Comptroller Of Income Tax [1962] CLJU 179; [1962] 1 LNS 179 HC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Teh Hwa Seong v. Chop Lim Chin Moh & Anor [1981] CLJU 99; [1981] 1 LNS 99 ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 2, 7(1), (2), (3B), (8)
Evidence Act 1950, ss. 17(1), 18(1), 74(a)(iii), 78(1)(f), 103, 114(g), 134
Federal Constitution, art. 5(1)
Interpretation Acts 1948 and 1967, ss. 2(1)(b), 17A
Public Authorities Protection Act 1948, s. 2(a)
Rules of Court 2012, O. 18 r. 2(1), O. 34 r. 2(2)(k)
Rules of the Court of Appeal 1994, r. 8(1)

For the appellants - Loh Chang Woo, Lim Shin Yee & Muhammad Norizul Naufal Dzulkarnain; M/s CW Loh & Assocs
For the respondent - Gan Khong Aik & Gwee Xi Wen; M/s Gan Partnership

A *[Editor's note: For the High Court judgment, please see Qi Qiaoxian & Anor v. Sunway Putra Hotel Sdn Bhd [2022] 10 CLJ 153 (overruled).]*

Reported by Lina E

JUDGMENT

B **Wong Kian Kheong JCA:**

A. Introduction

[1] This appeal to the Court of Appeal (this appeal) arose from a tragedy that befell Mr Qi Xiangqing (deceased), a 22 year-old male citizen of the
C People's Republic of China (PRC).

[2] The deceased was a tourist to Malaysia and stayed in a "five star" hotel, Sunway Putra Hotel Kuala Lumpur (hotel). Sadly, the deceased drowned in the hotel's swimming pool (pool) which was open to all the guests of the hotel.

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B. Background

[3] In this judgment, we shall refer to the parties as they were in the Sessions Court.

[4] The plaintiffs (plaintiffs) are the parents of the deceased.

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[5] On 14 February 2017:

(i) the deceased checked into the hotel owned by the defendant company (defendant); and

F (ii) after checking into the hotel, the deceased swam in the pool where he drowned (incident).

C. Proceedings In Sessions Court And High Court

[6] With regard to the incident, as parents and dependents of the deceased, the plaintiffs filed an action in the Sessions Court against the defendant (this
G action).

[7] In this action, the plaintiffs claimed damages for the deceased's death based on the following two causes of action:

(i) tort of negligence; and

H (ii) tort of occupier's liability.

[8] In the Sessions Court, prior to the commencement of the trial in this action (trial), all the parties agreed that there were only three issues to be tried, namely:

I (i) whether the plaintiffs had proven the existence of a duty of care on the part of the defendant as pleaded in sub-paras. 8(a) to (i) of the statement of claim;

(ii) was the death of the deceased caused by the defendant's breach of duty of care?; and

(iii) whether the plaintiffs were entitled to claim general damages, special damages, aggravated damages and bereavement from the defendant (three agreed issues to be tried).

[9] After the trial, the Sessions Court dismissed this action with costs (Sessions Court's decision). As such, the plaintiffs appealed to the High Court against the Sessions Court's decision (plaintiffs' appeal (High Court)).

[10] The learned High Court Judge dismissed the plaintiffs' appeal (High Court) with costs (High Court's decision). Hence, this appeal.

D. Grounds For Sessions Court's Decision And High Court's Decision

[11] The grounds for the Sessions Court's decision had been upheld on appeal to the High Court. According to both the learned Sessions Court and High Court Judges, among others:

(i) the plaintiffs had failed to prove the conditions for instituting a dependency action under s. 7(2) and (8) of the Civil Law Act 1956 (CLA);

(ii) due to non-compliance with s. 78(1)(f) of the Evidence Act 1950 (EA), both the Sessions Court and the High Court refused to admit as evidence at the trial the following documents tendered by the plaintiffs:

(a) original documents from PRC (in the Chinese language) evidencing the fact that the plaintiffs are the deceased's parents, namely:

(1) "notarial certificate";

(2) "heir certificate";

(3) "household register"; and

(4) "permanent resident register card"; and

(b) the English translation of the "heir certificate"

(this judgment shall refer to the above documents collectively as "PRC documents"). The PRC documents had been marked in the Sessions Court as "ID1", "ID9", "ID10" and "ID11A" to "ID11C" (not as court exhibits).

In view of the inadmissibility of the PRC documents in this case, the learned Sessions Court and High Court Judges had decided that the plaintiffs had failed to prove that they are the deceased's parents. Consequently, according to the Sessions Court and the High Court, the plaintiffs had no *locus standi* to commence this action; and

(iii) even if the plaintiffs had *locus standi* to commence this action:

(a) the defendant was not liable to the plaintiffs based on the tort of occupier's liability because swimming in the pool did not constitute an "unusual danger" to the hotel's guests, including the deceased;

(b) the plaintiffs had failed to prove on a balance of probabilities that the defendant was negligent with regard to the incident; and

(c) the defendant could rely on the defence of *volenti non fit injuria* to resist successfully this action.

[12] In accordance with established case law, *eg*, please refer to the Federal Court's judgment delivered by Syed Othman FJ in *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237; [1982] 1 MLJ 184, at 185, even though the learned High Court Judge had dismissed the plaintiffs' appeal (High Court), the High Court made the following award of damages (in the event the High Court's decision is reversed by the Court of Appeal):

(i) section 7(3B) of the CLA does not allow the court to award damages for bereavement;

(ii) the following special damages were awarded to the plaintiffs:

(a) travelling expenses in a sum of RM5,887 (travelling expenses);

(b) an amount of RM53,496 was awarded for funeral expenses (funeral expenses); and

(c) a sum of RM80 for the deceased's medical report is allowed (cost (deceased's medical report));

(iii) section 7 of the CLA does not allow claims for general damages and exemplary damages;

(iv) the plaintiffs' loss of support from the deceased was awarded as follows:

RM1,500 per month x 16 years x 12 months = RM280,000 (loss of support); and

(v) interest at the rate of 5% per annum was imposed on the above award of damages from the date of filing of this action until the date of full settlement of the same (interest award).

E. The Notice Of Cross-appeal By Defendant

[13] In this appeal, surprisingly, the defendant filed a notice of cross-appeal to the Court of Appeal against the following sums of damages calculated by the High Court (cross-appeal):

(i) travelling expenses;

(ii) funeral expenses;

(iii) loss of support; and

(iv) interest award.

F. Issues

[14] The following questions arise in this appeal:

(i) can the defendant file the cross-appeal under r. 8(1) of the Rules of the Court of Appeal 1994 (RCA) when the High Court's decision is wholly in favour of the defendant?;

(ii) whether the defendant can dispute the right of the plaintiffs to file this action when:

(a) the defence filed in this action (defence) pursuant to O. 18 r. 2(1) of the Rules of Court 2012 (RC) did not plead that the plaintiffs had no *locus standi* to file this action; and

(b) the three agreed issues to be tried (prepared in accordance with the Sessions Court's pre-trial case management direction under O. 34 r. 2(2)(k) of the RC) did not raise the question regarding the plaintiffs' right to commence this action;

(iii) whether the defendant is estopped from denying the fact that the plaintiffs are the parents and dependents of the deceased due to the following facts:

(a) the plaintiffs had come to Malaysia from PRC to:

(1) claim the body of the deceased from the Malaysian authorities; and

(2) repatriate the deceased's body to the deceased's hometown in PRC; and

(b) on 22 February 2017, the plaintiffs had dinner with the defendant's top management, including Mr Michael Monks (Mr Monks), the defendant's General Manager (GM) at the material time. At this dinner, Mr Monks offered to compensate the plaintiffs for the drowning of the deceased on the condition that the plaintiffs did not disclose the incident to the press and social media (Mr Monks' settlement proposal);

(iv) on the assumption that the defendant could raise the issue regarding the *locus standi* of the plaintiffs to institute this action:

(a) whether the plaintiffs had *locus standi* to file this action under s. 7(1), (2) and (8) of the CLA; and

(b) had the plaintiffs complied with ss. 74(a)(iii) and 78(1)(f) of the EA regarding the admissibility of the PRC documents as evidence at the trial? On this issue, whether the learned Sessions Court Judge's marking of the PRC documents as "IDs" (not as court exhibits) would bar the admissibility of the PRC documents as evidence at the trial;

(v) if the plaintiffs had the right to file this action:

(a) is the defendant liable to the plaintiffs pursuant to the tort of occupier's liability? The resolution of this question depends on whether the defendant's provision of the pool facility for the use and enjoyment of the hotel's guests (guests) constituted an "unusual danger" to the guests; and

(b) in respect of the defendant's liability to the plaintiffs for the tort of negligence:

(1) did the defendant owes a duty to take reasonable care to ensure that the deceased did not suffer any injury or death while swimming in the pool (the defendant's duty of care);

(2) if the defendant's duty of care existed, whether the defendant's duty of care had been breached in this case. This question discusses when the Court of Appeal can set aside concurrent findings of fact made by the Sessions Court and the High Court (that the defendant's duty of care had not been breached);

(3) whether Mr Monks' settlement proposal constituted an admission of the defendant's negligence as a cause for the deceased's death within the meaning of ss. 17(1) and 18(1) of the EA;

(4) should the court draws an adverse inference against the defendant under s. 114(g) of the EA on the grounds that the defendant had failed to call Mr Monks to testify at the trial and no evidence had been adduced by the defendant regarding why Mr Monks was not called as a defence witness?;

(5) can the defendant rely on a signboard at the entrance of the pool (which stated that no lifeguard was on duty at the pool and the pool was used by a person at his or her own risk (warning signboard)) to exclude liability to the plaintiffs for the tort of negligence?; and

(6) is the defence of *volenti non fit injuria* applicable in negligence claims?; and

(vi) with regard to the plaintiffs' claim for special damages:

(a) can a claim for special damages be proven only by way of documentary evidence?; or

(b) whether the court can accept credible testimony of a witness as a basis for an award of special damages.

[15] The issues stated in the above sub-paras. 14(i), (iv)(b) and (v)(b)(5) are novel because we are not able to find any previous Malaysian case which has decided on those issues.

G. Our Decision

Whether Defendant Can File Cross-appeal

[16] We reproduce below r. 8(1) of the RCA:

> r. 8. **Notice of cross-appeal**
>
> (1) It shall not be necessary for a respondent to give notice of appeal, but *if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice,* and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judges of the Court. (emphasis added)

[17] According to r. 8(1) of the RCA, a respondent can only file a notice of cross-appeal to the Court of Appeal against a decision of the High Court if the respondent intends to vary the High Court's decision. We are of the view that cross-appeal is incompetent for the following reasons:

(i) in this case, the High Court's decision is wholly in favour of the defendant. Consequently, the defendant had no basis to file the cross-appeal under r. 8(1) of the RCA because there was nothing in the High Court's decision to be varied in the defendant's favour;

(ii) if we do not strike out the cross-appeal, this will send a wrong message that notwithstanding the fact that the respondents have wholly succeeded in the High Court, the respondents can still file notices of cross-appeal to the Court of Appeal against such decisions of the High Court; and

(iii) if the cross-appeal is struck out, no prejudice is occasioned to the defendant because the defendant can still oppose this appeal to the hilt.

Premised on the above reasons, we strike out the cross-appeal with no order as to costs. No costs was granted to the plaintiffs because the plaintiffs had not objected to the invalid cross-appeal.

H. Can The Defendant Dispute The Plaintiffs' Right To File This Action?

[18] Firstly, the defence did not plead that the plaintiffs had no right to institute this action. It is trite law that the defendant is bound by its own defence.

[19] Secondly, in accordance with O. 34 r. 2(2)(k) of the RC, all the parties in this case had agreed to the three agreed issues to be tried. Order 34 r. 2(2)(k) of the RC states as follows:

A O 34 r. 2(2) *At a pre-trial case management, the Court may consider any matter* including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, *and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including:*

B …

(k) *the filing of a statement of issues to be tried;* (emphasis added)

During pre-trial case management of this case, if the defendant had raised an issue of law and/or fact which was not agreed to by the plaintiffs, the C defendant could have applied for and obtained leave of the Sessions Court to file the "defendant's issue(s) to be tried". The defendant did not however file the defendant's issue(s) to be tried in this case.

[20] With respect, both the learned Sessions Court and High Court Judges had committed an error of law in failing to consider that the defendant was D bound by the defence and the three agreed issues to be tried ("first legal error"). The defendant should not be allowed to raise any new issue which:

(i) had not been pleaded by the defendant in the defence; and

(ii) had been previously agreed to by all the parties in this case pursuant to E O. 34 r. 2(2)(k) of the RC.

If the defendant were allowed to raise any issue, legal and/or factual, which had not been pleaded in the defence and which had not been previously agreed to by the defendant in the three agreed issues to be tried:

F (i) this would be tantamount to a *carte blanche* for the defendant to conduct the trial by ambush; and

(ii) this would cause an injustice to the plaintiffs because the plaintiffs would be blindsided by the defendant's "new" issue to be tried.

G *I. Was The Defendant Estopped From Denying That The Plaintiffs Are Deceased's Parents?*

[21] In this case, the following facts had not been disputed by the defendant:

(i) upon being informed of the incident, the plaintiffs had flown to Malaysia H from PRC to:

(a) claim the body of the deceased from the Malaysian authorities; and

(b) repatriate the deceased's body to the deceased's hometown in PRC; and

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(ii) Mr Monks' settlement proposal had been made to the plaintiffs. If the plaintiffs are not the parents of the deceased, the defendant's top management, including Mr Monks, would not have invited the plaintiffs for dinner to discuss the incident and Mr Monks' settlement proposal would not have been made to the plaintiffs at that dinner.

[22] The doctrine of equitable estoppel has a wide application – please refer to the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at 294. We are of the considered view that the learned Sessions Court and High Court Judges had committed a plain error of fact as explained by the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67, at [78], when both the Sessions Court and the High Court failed to decide that the defendant was estopped by the undisputed facts stated in the above para. 21 from denying that the plaintiffs are the deceased's parents (first plain factual error).

J. Whether The Plaintiffs Could File This Action Under Section 7(1), (2) And (8) Of The CLA

[23] Notwithstanding our decision in the above Parts H and I, we will now discuss whether the plaintiffs had the right to institute this action pursuant to s. 7(1), (2) and (8) of the CLA. We will therefore assume that despite the defence and the three agreed issues to be tried, the defendant could dispute the plaintiffs' *locus standi* to commence this action.

[24] The relevant part of s. 7 of the CLA is reproduced below:

s. 7. Compensation to persons entitled for loss occasioned by death

(1) *Whenever the death of a person is caused by* wrongful act, *neglect* or default, *and the* act, *neglect* or default *is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.*

(2) *Every such action shall be for the benefit of the* wife, husband, *parent,* child and any person with disabilities under the care, if any, *of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.*

…

(8) *If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been*

A *brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.*
(emphasis added)

[25] According to both the Sessions Court and the High Court, the plaintiffs B had failed to prove the following two circumstances as stipulated in s. 7(8) of the CLA:

(i) there was no executor for the deceased's estate; and

(ii) if there was an executor for the deceased's estate, the executor should C have filed this action within six months from the deceased's death (two circumstances (s. 7(8) of the CLA)).

In view of the plaintiffs' failure to prove the two circumstances (s. 7(8) of the CLA), both the learned Sessions Court and High Court Judges decided that the plaintiffs had no *locus standi* to file this action pursuant to s. 7(2) and D (8) of the CLA.

[26] In *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537; [2006] 1 MLJ 1, at [14], Augustine Paul FCJ has delivered the following judgment of the Federal Court:

E [14] ... **Section 7(8) (CLA) empowers the dependents of a deceased person to maintain a dependency claim even in the absence of letters of administration in certain circumstances.** (emphasis added)

[27] The defendant's learned counsel had relied on a judgment of Court of Appeal judgment in *Kaliamah Rajan & Yang Lain lwn. Superintendent Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain* [2020] F 9 CLJ 252; [2020] 12 MLJ 334. In *Kaliamah*:

(i) the plaintiffs were the dependents of a detainee who had died in police custody;

(ii) the plaintiffs had filed a suit against the Government and certain police G officers for damages arising from the detainee's death; and

(iii) upon an application by the defendants, the High Court struck out the suit and this decision was affirmed by the Court of Appeal on the following two grounds:

H (a) the suit was time-barred under s. 2(a) of the Public Authorities Protection Act 1948 (PAPA); and

(b) the plaintiffs had not obtained letters of administration of the estate of the deceased detainee. Consequently, the plaintiffs did not have *locus standi* to file the suit under s. 7(2) of the CLA. The Court of I Appeal decided as follows, at [40] (in our National Language):

> [40] *Perayu-perayu telah memplidkan dua kausa tindakan terhadap responden-responden, iaitu kausa tindakan kecuaian dan kausa tindakan di bawah s. 7 Akta Undang-undang Sivil 1956. Perayu-perayu ketika membawa tindakan ini bukanlah wasi (executor) kepada si mati dan dengan itu gagal mematuhi pra-syarat s. 7(2) Akta Undang-undang Sivil 1956.* … (emphasis added)

[28] We are of the following view regarding s. 7(1), (2) and (8) of the CLA:

(i) section 7(1) of the CLA provides that if a person (X) has caused the death of another person (Y) by, among others, X's neglect, notwithstanding Y's death, X shall be liable to an action for damages regarding Y's death (dependency suit);

(ii) by reason of s. 7(2) of the CLA:

(a) the dependency suit "shall be for the benefit" of Y's dependents; and

(b) the dependency suit "shall be brought by and in the name of the executor" of Y. Section 2 of the CLA has defined the term "executor" as an "executor or administrator of a deceased person". A literal construction of s. 7(2) of the CLA, as applied in *Kaliamah*, means that only an executor or administrator of Y's estate (premised on the definition of "executor" in s. 2 of the CLA) (Y's executor/administrator) can commence a dependency suit (literal construction (s. 7(2) of the CLA)). Consequently, according to the literal construction (s. 7(2) of the CLA), if Y's executor/administrator has not been appointed by court, Y's dependents cannot commence a dependency suit at all;

(iii) a literal construction of s. 7(8) of the CLA is as follows:

(a) if Y's executor/administrator has not been appointed by court; or

(b) if Y's executor/administrator has been appointed by court but Y's executor/administrator has not filed a dependency suit within six calendar months after Y's death

namely, if the two circumstances (s. 7(8) of the CLA) are not present, the dependency suit "may be brought by all or any of the persons, if more than one, for whose benefit the (dependency suit) would have been brought if it had been brought by the (Y's executor/administrator)" literal construction (s. 7(8) of the CLA). The literal construction (s. 7(8) of the CLA) is supported by the judgment of the Federal Court in *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537*;* [2006] 1 MLJ 1;

(iv) CLA has been revised under the Revision of Laws Act 1968. According to s. 2(1)(b) of the Interpretation Acts 1948 and 1967 (IA), Part 1 IA applies to the construction of the CLA. According to s. 17A IA

(in Part 1 IA), the court shall construe s. 7(1), (2) and (8) of the CLA in a purposive manner. The purpose of s. 7(1), (2) and (8) of the CLA is to enable Y's dependents, irrespective of whether Y's Executor/ Administrator has been appointed by court or otherwise, to commence a dependency suit (purposive construction (s. 7(8) of the CLA);

(v) there is a conflict between:

(a) the literal construction (s. 7(8) of the CLA); and

(b) the literal construction (s. 7(2) of the CLA) and purposive construction (s. 7(8) of the CLA) (referred collectively in this judgment as "literal and purposive construction (s. 7(8) of the CLA)".

This conflict should be resolved in favour of the literal and purposive construction (s. 7(8) of the CLA) because the literal and purposive construction (s. 7(8) of the CLA) ensures that all dependents of Y, irrespective of whether Y's executor/administrator has appointed by court or not, can commence a dependency suit and have been access to justice (fundamental access to justice). Fundamental access to justice is guaranteed under art. 5(1) of our Federal Constitution – please refer to the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, at [4]; and

(vi) with regards to *Kaliamah*:

(a) *Kaliamah* may be explained on the grounds that the suit in that case had already been time-barred under s. 2(a) of the PAPA; and

(b) *Kaliamah* did not discuss:

(1) section 7(8) of the CLA, in particular the literal and purposive construction (s. 7(8) of the CLA); and

(2) the Federal Court judgment in *Yong Siew Choon*. As a matter of *stare decisis*, the Court of Appeal is bound by the Federal Court's decision in *Yong Siew Choon*.

[29] It is clear that both the learned Sessions Court and High Court Judges did not consider the literal and purposive construction (s. 7(8) of the CLA) (second legal error). The second legal error had deprived the plaintiffs of their fundamental access to justice.

K. Were PRC Documents Admissible As Evidence?

[30] Sections 74(a)(iii) and 78(1)(f) of the EA state as follows:

s. 74. Public documents

The following documents are public documents:

(a) *documents forming the acts or records of the acts of:*

…

(iii) *public officers, legislative, judicial and executive*, whether Federal or State or of any other part of the Commonwealth or *of a foreign country;* …

s 78. Proof of certain official documents.

(1) *The following public documents may be proved as follows:*

…

(f) *public documents of any other class in a foreign country*

– *by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.* (emphasis added)

[31] Section 78(1)(f) of the EA allows the following documents of a foreign country (foreign documents) to be admitted as evidence:

(i) the foreign documents are "public documents" as understood in s. 74(a)(iii) of the EA; and

(ii) the public foreign documents may be adduced as evidence under s. 78(1)(f) of the EA if one of the two following alternative limbs is proven:

(a) when the original copies of the public foreign documents (original foreign documents) are tendered as evidence (first limb (s. 78(1)(f) of the EA)); or

(b) if the original foreign documents are not adduced as evidence, copies of the foreign documents (copies (foreign documents) may be tendered as evidence if:

(1) the copies (foreign documents) are certified by the lawful keeper of the original foreign documents; and

(2) a certificate under the seal of a notary public or of a consular officer of Malaysia in the foreign country in question that the copies (foreign documents) have been duly certified by the officer having the lawful custody of the original foreign documents and upon proof of the character of the original foreign documents according to the law of the foreign country second limb (s. 78(1)(f) of the EA)).

[32] Firstly, the PRC documents are "public documents" of PRC within the meaning of ss. 74(a)(iii) of the EA and 78(1)(f) of the EA.

[33] Secondly, the trial was conducted virtually. At the virtual trial:

(i) the plaintiffs gave evidence online in PRC in the physical presence of the defendant's supervising solicitors (who are legal practitioners in PRC); and

(ii) the original copies of the PRC documents (original PRC documents) had been adduced as evidence by the plaintiffs at the trial in:

(a) the physical presence of the defendant's supervising solicitors in PRC (where the plaintiffs testified online); and

(b) the virtual presence of the learned Sessions Court Judge as well as learned counsel for the plaintiffs and the defendant;

(iii) the defendant's learned counsel did not object to the admissibility of the original PRC documents as evidence at the trial; and

(iv) the learned Sessions Court Judge had marked all the PRC documents as "IDs" (not as court exhibits).

[34] Thirdly, with regards to the admissibility of the original PRC documents as evidence in this case, we are of the view that the plaintiffs had complied with ss. 74(a)(iii) of the EA and the first limb (s. 78(1)(f) of the EA). Accordingly, the learned Sessions Court and High Court Judges had committed an error of law by rejecting the admissibility of the original PRC documents as evidence in this case (third legal error).

[35] Fourthly, the defendant's learned counsel had relied on the following three cases to support the exclusion of the original PRC documents as evidence in this case by the Sessions Court and the High Court under s. 78(1)(f) of the EA:

(i) the decision of Mary Lim Thiam Suan FCJ in the Federal Court case of *Pembinaan SPK Sdn Bhd v. Conaire Engineering Sdn Bhd-LLC And Anor And Another Appeal* [2023] 3 CLJ 677;

(ii) the judgment of the Court of Appeal delivered by Stephen Chung Hian Guan JCA in *Nguyen Doan Nhan v. PP & Another Appeal* [2018] CLJU 1583; [2018] 1 LNS 1583; and

(iii) the decision of Abu Bakar Katar J in the High Court in *Jamaal Abu Bakar Bawazir lwn. Ismail Husin & Yang Lain* [2020] CLJU 632; [2020] 1 LNS 632 (three cases).

With respect to learned counsel for the defendant, in the three cases, only copies of the following documents (not original documents) were tendered and consequently, the second limb (s. 78(1)(f) of the EA) had not therefore been satisfied in the three cases:

(i) in *Pembinaan SPK*, at [25], only a copy (not the original) of the judgment of a court in Abu Dhabi was tendered as evidence;

(ii) a copy (not the original) of the Vietnamese birth certificate of the accused was adduced as evidence in *Nguyen Doan Nhan*, at [37]; and

(iii) in *Jamaal*, at [4] and [29], a copy (not the original) of the death certificate of the registered proprietor of the land in question (issued by Egyptian authorities) was tendered as evidence.

[36] Lastly, if a party adducing a document (document Z) has not proven the admissibility of document Z in court, the court can only mark document Z as an "ID" (not as a court exhibit) to indicate that document Z has only been identified in court (but not proven as a court exhibit). Needless to say, in the above circumstances, the court cannot consider document Z in deciding a case because the admissibility of document Z has not been satisfied – please refer to the judgment of Abdoolcader J (as he then was) in the High Court case of *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] CLJU 92; [1977] 1 LNS 92; [1977] 1 MLJ 180, at 183. However, if the admissibility of document Z has been fulfilled in a case, the trial court should consider the contents of document Z in deciding the case even though the trial court has erroneously marked document Z as an ID.

In this case, the plaintiffs had successfully proven the admissibility of the original PRC documents as evidence in this case pursuant to ss. 74(a)(iii) of the EA and the first limb (s. 78(1)(f) of the EA). Consequently, the error of the learned Sessions Court Judge in marking the original PRC documents as "IDs" cannot bar the admissibility of the PRC documents as evidence at the trial.

L. Whether The Defendant Was Liable To The Plaintiffs For Tort Of Occupier's Liability

[37] It is not disputed that for the defendant to be liable to the plaintiffs pursuant to the tort of occupier's liability, the plaintiffs have to prove cumulatively the following three elements of such a tort:

(i) the defendant had a sufficient degree of control of the pool at the time of the incident so as to be liable to the plaintiffs as an "occupier" of the pool (first element (occupier's liability));

(ii) the deceased was a guest of the defendant in the hotel (second element (occupier's liability)); and

(iii) the drowning of the deceased constituted an "unusual danger" to the deceased for which the defendant had failed to take reasonable care as an occupier of the pool to prevent the drowning (third element (occupier's liability))

– please refer to *Rexallent Construction Sdn Bhd v. MSIG Insurance (Malaysia) Bhd & Other Cases* [2022] CLJU 1736; [2022] 1 LNS 1736; [2023] 2 MLRH 100, at [39].

[38] In this case, it is not disputed that the first element (occupier's liability) and second element (occupier's liability) had been satisfied, However, the third element (occupier's liability) could not be established by the plaintiffs in this case because swimming in the pool did not constitute an "unusual danger" to the hotel's guests, including the deceased. Consequently, the learned Sessions Court and High Court Judges did not err in this respect.

M. Whether The Defendant Is Liable To The Plaintiffs For Tort Of Negligence

[39] The defendant can only be liable to the plaintiffs for the tort of negligence if the plaintiffs can prove all of the following three matters on a balance of probabilities:

(i) the defendant's duty of care existed;

(ii) if the defendant's duty of care existed, whether the defendant's duty of care had been breached in this case (breach (defendant's duty of care)); and

(iii) did the breach (defendant's duty of care) cause the drowning of the deceased?

Whether The Defendant's Duty Of Care Existed

[40] The learned Sessions Court and High Court Judges had correctly decided that the defendant's duty of care existed. Premised on the Federal Court's judgment delivered by Zainun Ali FCJ in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008, at [67], [68], [74], [76], [80], [82] and [86], the following evidence and reasons support the existence of the defendant's duty of care:

(i) there was "sufficient legal proximity" between the deceased and the defendant because:

(a) it was reasonably foreseeable that if the defendant did not exercise reasonable care regarding the pool, the deceased would suffer injury or death if the deceased swam in the pool;

(b) there was a contract between the deceased and the defendant regarding the stay of the deceased at the hotel (contract (deceased-defendant));

(c) the defendant had voluntarily assumed responsibility to the defendant by making the pool available to the deceased as a hotel guest; and

(d) there was physical proximity, circumstantial proximity and causal proximity between the deceased and the defendant; and

(ii) the existence of the defendant's duty of care was not negated by any policy consideration. A

Was There Breach (The Defendant's Duty Of Care)?

[41] Both the learned Sessions Court and High Court Judges had made concurrent findings of fact that there was no breach (the defendant's duty of care) (concurrent factual findings). The concurrent factual findings were based on the following evidence and reasons: B

(i) the warning signboard had been erected at the entrance of the pool and clearly stated that:

(a) no lifeguard was on duty at the pool; and C

(b) the pool could only be used by a person at his or her own risk;

(ii) along the pool at various points, there were signs at the side of the pool which stated the depth of the pool at those points; and

(iii) there were "safety float lines" dividing the pool according to the various depths of the pool. D

[42] In this appeal, we are mindful that there are concurrent factual findings. In the Federal Court case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, at [7], Gopal Sri Ram FCJ has explained that an appellate may set aside a finding of fact made concurrently by two lower courts if there was an "unwarranted deduction based on faulty judicial reasoning from admitted and established facts" by the two lower courts. E

[43] Notwithstanding the three reasons given by the learned Sessions Court and High Court Judges in the above para. 41, there was an "unwarranted deduction based on faulty judicial reasoning from admitted and established facts" by the Sessions Court and the High Court. This is due to the following evidence and reasons: F

(i) the deepest part of the pool was three metres (three-metre deep pool); G

(ii) the defendant operates a "five star" hotel and the deceased had paid for the defendant's services in a "five star" hotel; and

(iii) in view of the three-metre deep pool, any reasonable operator of a "five star" hotel should have ensured that: H

(a) a certified lifeguard should be on duty at the pool when the pool was open to the hotel's guests (including the deceased); and

(b) at the time of the incident, an employee of the defendant should be monitoring the "closed circuit television" (CCTV) which had already been installed at the pool. If otherwise, why would the defendant install the CCTV in the first place. I

[44] As explained in the above para. 43, we are of the following view:

(i) the concurrent factual findings are plainly wrong; and

(ii) the breach (the defendant's duty of care) had been proven by the plaintiffs on a balance of probabilities.

[45] The failure of the learned Sessions Court and High Court Judges to decide that the plaintiffs had proven on a balance of probabilities the breach (the defendant's duty of care) is a plain error of fact (second plain factual error).

Did Breach (The Defendant's Duty Of Care) Cause Death Of The Deceased?

[46] In this case, it is clear that the breach (the defendant's duty of care) had caused the death of the deceased. To the credit of the defendant's learned counsel, the defendant did not dispute the causation of the deceased's death. Nor did the defendant allege that the death of the deceased was too remote to be recoverable in law.

Had The Defendant Admitted Negligence?

[47] The relevant parts of ss. 17(1) and 18(1) of the EA are reproduced below:

> **s 17. Admission** and confession **defined**
>
> (1) *An admission is a statement, oral* or documentary*, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.*
>
> s 18. **Admission by party to proceeding, his agent** or person interested
>
> (1) *Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.* (emphasis added)

[48] We are of the view that Mr Monks' settlement proposal constituted an admission of the defendant's negligence as the cause for the deceased's death within the meaning of ss. 17(1) and 18(1) of the EA. Our reasons are as follows:

(i) the defendant did not dispute that Mr Monks was the defendant's GM at the material time. In other words, at the time of the incident, Mr Monks was the defendant's "agent" within the meaning of s. 18(1) of the EA; and

(ii) as understood in s. 17(1) of the EA, Mr Monks' settlement proposal "suggests [an] inference" as to the "fact in issue" in this case, namely the defendant was negligent in the drowning of the deceased.

[49] Mr Monks' settlement proposal supports the defendant's breach (duty of care). Accordingly, the failure of the learned Sessions Court and High Court Judges to consider Mr Monks' settlement proposal is a plain error of fact (third plain factual error).

Should Court Draw An Adverse Inference Against Defendant?

[50] In view of Mr Monks' settlement proposal, Mr Monks was a material witness in this case. Yet, the defendant did not call Mr Monks to testify as a defence witness. Worse still, no evidence had been adduced by the defendant on why the defendant could not have applied for a court subpoena to compel Mr Monks to give evidence at the trial. As such, the Sessions Court and the High Court should have exercised their discretion to make an adverse inference pursuant to s. 114(g) of the EA against the defendant who had suppressed material evidence with regard to Mr Monks' settlement proposal – please refer to the Supreme Court's judgment delivered by Mohd Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, at 494. Such a failure on the part of the learned Sessions Court and High Court Judges, in our view, is tantamount to a legal error (4th legal error).

N. Can The Defendant Rely On Warning Notice?

[51] With respect, the learned Sessions Court and High Court Judges committed a mixed error of law and fact (mixed error (law and fact)) when both the Sessions Court and the High Court decided that the defendant could not be liable to the plaintiffs for the incident due to the warning notice. The mixed error (law and fact) had been committed by the learned Sessions Court and High Court Judges as follows:

(i) before the defendant accepted the deceased as a guest of the hotel, the defendant did not require the deceased to agree to any "disclaimer of liability" for any injury or death which might befall the deceased when the deceased was staying at the hotel;

(ii) the contract (deceased-defendant) did not contain any clause which would exclude the defendant's liability for the incident; and

(iii) there was no evidence that the deceased understood English, namely, the contents of the warning signboard.

O. Whether Defence Of Volenti Non Fit Injuria Applied In This Case

[52] Both the learned Sessions Court and High Court Judges had made a far-reaching decision, namely, the defence of *volenti non fit injuria* can absolve wholly the liability of the defendant in negligence claims. According to the Sessions Court and the High Court, the deceased (an adult person) voluntarily swam in the pool. Consequently, according to both the learned Sessions Court and High Court Judges, the deceased, with full knowledge of all the risks of swimming in the pool, had freely consented to such risks.

[53] Our research has revealed the following two judgments which are relevant to the above issue:

(i) a judgment of United Kingdom's Court of Appeal in *Slater v. Clay Cross Co Ltd* [1956] 2 QB 264; and

(ii) Yusof Abdul Rashid J's decision in the High Court case of *Teh Hwa Seong v. Chop Lim Chin Moh & Anor* [1981] CLJU 99; [1981] 1 LNS 99; [1981] 2 MLJ 341.

[54] In *Slater*, at 271, Denning LJ (as he then was) has decided as follows:

> *Mr Elwes next relied on the maxim volenti non fit injuria. He said that the plaintiff must have known that it was dangerous to walk along this little tunnel and she must be taken voluntarily to have incurred the risk of danger from trains. He also said that that danger was an obvious one, and a licensee cannot complain of dangers which are obvious or known to him or her. On this matter Mr Elwes very properly drew our attention to the decision of Asquith J in Dann v. Hamilton [1939] 1 KB 509 where a passenger took a lift with the driver of a car who was obviously under the influence of drink. There was an accident due to the negligence of the driver, and it was said that the passenger had no cause of action against the driver because she had voluntarily incurred the risk. Asquith J held that the maxim volenti non fit injuria had no application to the case; and he gave judgment in favour of the injured passenger. I must say that I agree with him. … In so far as he decided that the doctrine of volenti did not apply, I think the decision was quite correct.* In so far as he suggested that the plea of contributory negligence might have been available, I agree with him.
>
> *Applying that decision to this case, it seems to me that when this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence, but is not a bar to the action.* (emphasis added)

[55] It is decided in *Teh Hwa Seong*, at pp. 342 to 343:

> *The plaintiff alleged that he was a lawful passenger travelling in the lorry but the defendants pleaded that the maxim volenti non fit injuria applied. The plaintiff testified that on that material day when he asked for a lift from the second defendant to accompany the oil palm fruits to the factory he was allowed to do so and he was not warned that he travelled in the lorry at his own risk. The uncontroverted facts showed that the second defendant was driving the motor lorry for the purposes of the first defendants.*
>
> *To succeed in raising such a defence the defendants had to prove that the plaintiff had voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it.*
>
> *In Letang v. Ottawa Electric Rly Co [1926] AC 725, 731 PC the Privy Council held:*

The law of Canada and England seems to be summed up in the leading proposition to Wills J's judgment: 'If the defendants desire to succeed on the ground that the maxim Volenti Non Fit Injuria is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it'.

In *Bennett v. Tugwell (An Infant)* [1971] 1 All ER 248, *Ackner J* at page 253 *said:*

… The defendant must prove on the balance of probabilities that the plaintiff did assent to being carried at his own risk and to exempt the defendant from liability for the negligence which caused this accident.

and regarding the effect of a notice which states "Passengers travelling in this vehicle do so at their own risk" Ackner J said:

… without the assistance of authority the meaning of this warning seemed to me to be clear, namely, passengers are warned that if they travel in this car, they bear the risk of the driver driving negligently. However, it was comforting to find that nearly a hundred years ago this was so decided, in McCawley v. Furness Ty Co [1872] LR 8 QB 57 …

I would respectfully adopt and follow the proposition of law and effect of such notice as expounded by Ackner J.

On behalf of the first defendants it was disclosed that the second defendant, when he was engaged by the first defendants about two weeks before the date of the accident, was told that he was not to allow any passenger to travel in the lorry driven by him since the first defendants had not taken any insurance to cover any passenger travelling in the lorry in the event of an accident. *It was also alleged that in the driver's cabin was affixed a label "Riding At Your Own Risk". I had no doubt at all that the second defendant was prohibited from taking any passengers to travel in the lorry but I was not satisfied that there was any label "Riding At Your Own Risk" affixed in the driver's cabin.*

Lim Kee Tian, one of the partners of the first defendants, in his evidence before me said that there was a "Riding At Your Own Risk" label affixed in the driver's cabin of the lorry. It impressed me that the label was in English and the wordings of the notice were in fact "Riding At Your Own Risk". This impression was grounded on the statement of defence of the first defendants and the affidavits of the second defendant in support of an application to set aside the default judgment entered against him earlier. However in evidence the second defendant insisted that the purported label was in Bahasa Malaysia and it was "Dilarang Penumpang". He even spelled it out in court. As such, there was a grave doubt in my mind whether or not there was any such label affixed in the driver's cabin warning any person who wished to get a lift in the lorry that such passenger was travelling therein at his own risk. It was most probable that there was no such label.

Even assuming that there was such a label either in English "Riding At Your Own Risk" or in Bahasa Malaysia "Dilarang Penumpang", there was a doubt in my mind as to whether the plaintiff's attention was ever directed to it. The plaintiff said in evidence that he told second defendant that he had to accompany the oil palm fruits to the factory and the second defendant allowed him to travel in the lorry. According to the plaintiff the second defendant said nothing about the plaintiff's travelling in the lorry at his own risk. I believed the plaintiff. I could not believe the second defendant and rejected his evidence when he said he warned the plaintiff that the plaintiff was travelling in the lorry at his own risk and directed the attention of the plaintiff to the label "Riding At Your Own Risk" or "Dilarang Penumpang".

The second defendant was only about two weeks in the employment of the first defendants and would not know who were the responsible persons in the firm of the first defendants. Hence, it would not be surprising if the second defendant, as in this case, mistook the plaintiff as one of those responsible persons in the firm of the first defendants and had treated the plaintiff with respect and held him in deference. Under such circumstances, it was most probable that the second defendant had not deemed it necessary to question the right of the plaintiff to travel in the lorry as a passenger. In the police report the second defendant referred to the plaintiff as his employer when he used the words "towkey saya". *Thus it was more probable that not only had the second defendant not directed the plaintiff's attention to a label "Riding At Your Own Risk", if any, affixed in the driver's cabin but the second defendant had also failed to warn the plaintiff that he was travelling in the lorry at his own risk.*

I was of the view that the plaintiff had not travelled in the lorry voluntarily and freely agreeing to undergo the risk that he might incur therefrom nor did the plaintiff know that he so travelled therein at his own risk. In the circumstances, the first defendants were vicariously liable for the negligence of the second defendant who was their employee at the material time. (emphasis added)

[56] Firstly, with regards to the High Court's judgment in *Teh Hwa Seong*:

(i) regrettably, the above judgment of Denning LJ (as he then was) in *Slater* was not brought to the attention of the High Court in *Teh Hwa Seong*; and

(ii) in *Teh Hwa Seong*, the High Court had rightly rejected the application of the defence of *volenti non fit injuria* in that case because:

(a) the driver of the lorry in question (lorry driver) had not warned the plaintiff passenger (before the plaintiff passenger sat in the lorry) that the plaintiff was travelling in the lorry at the plaintiff's own risk; and

(b) the lorry driver had failed to bring to the plaintiff's attention a label "riding at your own risk" (which the defendants claimed had been affixed in the driver's cabin of the lorry).

[57] Secondly, we express the following view:

(i) we adopt the reasoning in *Slater* and state that a defence of *volenti non fit injuria* can only be invoked by a defendant (S) if a victim of a tort (T) has voluntarily agreed to assume the risk of harm to T which may be caused by the commission of a tort by S (T's consent (tort));

(ii) S cannot rely on a defence of *volenti non fit injuria* in a tortious claim by T merely on the following grounds that:

(a) T has full knowledge of the activity carried out by T (T's activity); and

(b) T's activity was voluntary;

(iii) even if:

(a) there is a warning, notice, sign, signage, billboard, signboard, poster, label or any document by S which excludes S's tortious liability for T's activity (S's warning); and

(b) T has been previously informed of the contents of S's warning

– S cannot rely on S's warning to invoke a defence of *volenti non fit injuria* unless S can prove T's consent (tort) on a balance of probabilities. For the avoidance of any doubt, we overrule whatever was decided in *Teh Hwa Seong* which is inconsistent with our judgment regarding the effect of S's warning; and

(iv) by reason of s. 103 of the EA, the burden to prove T's consent (tort) lies solely on S (not T). Section 103 of the EA reads as follows:

> *Burden of proof as to particular fact*
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.* (emphasis added)

[58] In this case, the deceased voluntarily took the risk of swimming in the pool. The deceased, however, did not voluntarily agree to assume the risk of any harm to the deceased which might be caused by the defendant's negligence (as explained in the above para. 43). Accordingly, premised on *Slater* and the reasons expressed in the above para. 57, the learned Sessions Court and High Court Judges had erred in law when they applied the defence of *volenti non fit injuria* in this case (5th legal error).

P. Whether Claim For Special Damages Can Only Be Proven By Documentary Evidence

[59] The defendant's learned counsel had contended that the plaintiffs' claim for special damages should be dismissed because such a claim was not supported by documentary evidence. This submission found favour with the learned Sessions Court and High Court Judges.

[60] With respect to the Sessions Court and the High Court, we are of the view that a claimant can claim for special damages based solely on the credible testimony of a witness. This decision is premised on the following reasons:

(i) there is nothing in the EA which has provided, either expressly or by necessary implication, that special damages can only be proven by way of documentary evidence. In fact, s. 134 of the EA has stated that no particular number of witnesses shall in any case be required for the proof of any fact;

(ii) in the High Court case of *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825, at [39] and [40], Vazeer Alam Mydin Meera JC (as he then was) has decided as follows:

> *[39] Counsel for the defendants whilst agreeing that Nurul Husna may need to be fed special food, vitamins and nutritional supplements, argues that without proper documentary evidence of payment receipts for such purchases, a sum of RM200 per month would be more appropriate.*
>
> *[40] I allowed the sum of RM44,500 as claimed by the plaintiffs as the amount claimed is not farfetched in today's prices and it would be too much to expect Nurul Husna's parents to keep documentary proof of expenses incurred for these expenses since her birth. In this regard, I accept the submissions of counsel for the plaintiffs that the evidence was clear that the irreversible injuries and disabilities suffered by Nurul Husna had and continue to have an overwhelming and debilitating effect on her parents and carers. Their resources were centred on first saving her life and next caring for her. In such circumstances it is unreasonable to expect Nurul Husna's parents to collect bills and receipts and filing them away with a view to bringing a claim especially when the defendants had hidden their culpability in the treatment and management provided to Nurul Husna. (See Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332). Indeed, if the defendants had candidly acknowledged their negligence earlier, than Nurul Husna's parents could have taken legal advice much earlier and kept copies of their bills and receipts to support their claim. In this regard, I accept that it would be unrealistic to expect Nurul Husna's parents have copies of bills and receipts for all of the expenses.* (emphasis added); and

(iii) in the Singapore High Court case of *STU v. The Comptroller Of Income Tax* [1962] CLJU 179; [1962] 1 LNS 179; [1962] 1 MLJ 220, at 221, Tan Ah Tah J gave the following judgment:

> *In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the*

facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view, be accepted. (emphasis added)

[61] As explained in the above para. 60, the learned Sessions Court and High Court Judges had committed an error of law when they rejected the plaintiffs' claim for special damages solely on the ground that the plaintiffs had adduced no document in support of such a claim (6th legal error). In this case, no evidence had been adduced by the defendant to show that the plaintiffs were not truthful witnesses and their oral evidence on their claim for special damages was not credible.

Outcome Of This Appeal

[62] In view of the first to sixth legal errors, first to third plain factual errors and mixed error (law and fact) on the part of the Sessions Court and the High Court, this appeal is allowed with the following order:

(i) the defendant shall pay to the plaintiffs the quantum of damages as computed by the learned High Court Judge in the above sub-paras. 12(2) and (4) (award (damages));

(ii) interest is awarded on the award (damages) as stated in the above sub-para. 12(5);

(iii) both the Sessions Court's decision and the High Court's decision are set aside; and

(iv) the defendant shall pay to the plaintiffs costs in a sum of RM25,000 for proceedings at three levels, *ie*, the Sessions Court, High Court and Court of Appeal (subject to the allocatur fee).